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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re BRANDON M., a Person Coming  
Under the Juvenile Court Law

SAN BERNARDINO COUNTY  
DEPARTMENT OF CHILDREN'S  
SERVICES,

Plaintiff and Respondent,

v.

SCOTT B.,

Defendant and Appellant.

E032079

(Super.Ct.No. J170853)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Arthur A. Harrison,  
Judge. Affirmed.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Alan K. Marks, County Counsel, and Daniela C. Fernandez, Deputy County Counsel,  
for Plaintiff and Respondent.

Kathleen Murphy Mallinger, under appointment by the Court of Appeal, for Minor.

Scott B. is the presumed father (father) of Brandon M. (the child). Father appeals from the juvenile court's order terminating his parental rights under Welfare and Institutions Code section 366.26.<sup>1</sup> On appeal, father contends that the judgment must be reversed because (1) the juvenile court erred in finding that father was provided with reasonable services, and (2) his counsel rendered ineffective assistance of counsel (IAC). We affirm the judgment.

### FACTUAL AND PROCEDURAL HISTORY

In August 2000, when Brandon was just 11 days old, the San Bernardino County Department of Public Social Services (now known as the Department of Children's Services or DCS) filed a section 300 petition on behalf of the child. As to father, the petition alleged that father (1) suffered from a substance abuse problem which interfered with his ability to parent the child; and (2) failed to arrange for the child's care.

On August 24, 2000, the juvenile court found that a prima facie case had been established for detention out of the home and the child was placed in DCS custody. The court ordered reunification services pending the September 14, 2000, jurisdictional and dispositional hearing.

In a jurisdictional/disposition report dated September 14, 2000, the social worker recommended that father be declared the child's presumed father and be provided family reunification services.

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise specified.

The report also provided that father had a severe drug abuse problem, which impeded his ability to care for the child. Moreover, father's criminal history included convictions for driving under the influence and reckless driving.

In an addendum report filed on November 6, 2000, the social worker reported that father claimed to be investigating different treatment programs for his drug abuse problem. Moreover, father agreed to forego visits with the child until the child's medical condition stabilized.

In a second addendum report signed November 29, 2000, the social worker reported that beginning October 31, 2000, several requests were made to father to obtain medical clearance regarding father's hepatitis status to ensure the child's safety during visits. Father, as of November 29, 2000, had failed to obtain the medical clearance. The social worker also noted that father had tested negative for drugs on October 31, 2000. Father, however, still had failed to enter a drug treatment program.

In a third addendum report dated January 22, 2001, the social worker reported that father had enrolled in a drug rehabilitation program. Also, DCS received verification that father had tested positive for hepatitis C and was considered infectious.

At the jurisdictional and dispositional hearing, the juvenile court found that the child came within section 300. As to father, the court found the section 300 petition allegations to be true. Moreover, the court declared father a presumed father and ordered that he be provided services.

The social worker's July 19, 2001, six-month review report recommended that father's reunification services be terminated and that a section 366.26 permanency planning

hearing be set. The social worker reported that father had failed to comply with the drug treatment and testing portions of his reunification plan. In addition, father failed to complete his parenting program.

Regarding visitations, father was not consistent. Father generally spent the duration of the visits conversing with the individual supervising the visit; father only occasionally held the child.

The report also highlighted father's general lack of accountability. Father refused to believe that alcohol posed a problem or that it interfered with his ability to parent. Father also believed that he did not need to participate in services to provide the child with adequate care. Moreover, father was convinced that there were no safety issues and that the child should be returned to his care without supervision.

On May 3, 2001, the social worker prepared a "Letter of Concern" which pointed to father's lack of progress with his plan. This letter was delivered to father and his attorney.

At the section 366.21, subdivision (e), review hearing on July 30, 2001, father's counsel informed the juvenile court that, according to father, his visits with the child were scheduled during the same time as his classes. The court reaffirmed the order of supervised weekly visits and ordered DCS to arrange visits that were more convenient. DCS complied with the court's order.

At the contested six-month review hearing, the juvenile court terminated father's reunification services and set a section 366.26 permanency review hearing. Father filed a petition for extraordinary writ. The writ did not raise any issues of unreasonable reunification services. We denied the writ.

The social worker's section 366.26 report, the addendum to the report, and the adoption assessment recommended the termination of father's parental rights under section 366.26, subdivision (c)(1). Because of the child's young age and the desire of the child's current caretakers to adopt him, the social worker reported that the child was appropriate for adoption.

The section 366.26 report, which was dated January 29, 2002, confirmed that father had failed to visit the child since June of 2001, even though the once-a-week visitation order was still in effect. The adoption assessment report indicated that the child had been at his current placement since November of 2000, and that he was bonded with his caretakers. In a later report, the social worker indicated that father had visited the child only three times between June of 2001 and April of 2002.

At the section 366.26 hearing on January 29, 2002, father's attorney did not appear. Instead, the child's attorney specially appeared on behalf of father's attorney.

At the hearing, the child's counsel informed the court of a potential conflict in representing both the child and father. She stated that, because she represented the child, she was "really not in a position to represent [father's] position today, although, it looks like he needs to be heard." Because mother requested a contested section 366.26 hearing, the court decided to continue the pending visitation order regarding the child and his siblings. Thereafter, the child's counsel indicated that father's counsel had contacted her and asked her to say "no comment" at the hearing. The child's counsel, however, informed the court that father had another issue. The court noted that, because the section 366.26 hearing would be set for a trial with a full evidentiary hearing on the issue of termination of parental

rights, “[t]he father will have an opportunity at that time to present evidence and any other issues or concerns that he has.” The matter was then continued.

At the January 29, 2002 section 366.26 hearing, the juvenile court also indicated that father’s counsel was no longer accepting appointments, and that it would set a “confirmation of counsel” hearing to determine the representation of father in this matter. Father was present when this discussion occurred. Thereafter, at the confirmation of counsel hearing on February 20, 2002, new counsel was appointed on behalf of father. Father was not present at this hearing.

At the contested section 366.26 hearing, father was present. Father’s new counsel informed the court that father was opposed to the recommendation of termination of parental rights. She also stated that “[father] has a lot of concerns that are not relevant to this hearing as to how the matters have proceeded over the entire course of this case. And they are not his specifically, neither one of them being advised of a number of facts, including facts concerning the placement where [the child] has been since November of 2000, and what he sees as a lack of forthrightness or truthfulness on the part of the caseworker.” In reply, the juvenile court clarified that the placement issues and misrepresentations father was complaining about involved the fact that the child was placed with “life partners.”

Thereafter, counsel further stated that “We are at a .26 hearing, and father indicates that there are reports he never received. And since I was not the attorney appointed -- attorney until at least February the 20th of this year, I have no way of knowing for certain how various matters were handled.” After considering all the evidence and hearing the

arguments of counsel, the juvenile court terminated father's parental rights as to the child, and the child was freed for adoption.

Father now appeals. Father also filed a request for judicial notice on November 21, 2002. Father asks that we take judicial notice of the distance between father's home in Yucca Valley to Rancho Cucamonga. As will be discussed below, because we hold that father is precluded from arguing lack of reasonable services on appeal, we deny father's request for judicial notice filed November 21, 2002 as moot.

Counsel for minor agrees with the position set forth in the respondent's brief and urges affirmance of the judgment.

### ANALYSIS

#### I. Father Is Precluded From Arguing That DCS Failed to Provide Reasonable Reunification

##### Services

Father contends that the juvenile court erred in finding that reasonable services were provided to the child because "no visitation was ordered for five months and DCS failed to provide reasonable visitation."

Father's contention is without merit. Father never raised this contention below; he is thus precluded from raising it on appeal now.<sup>2</sup> He is further precluded from raising the matter upon appeal after a termination hearing (section 366.26), because he failed to raise

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<sup>2</sup> *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.

this issue either as a postdispositional appeal or upon extraordinary writ following the order setting the termination hearing.<sup>3</sup>

Hence, father is precluded from raising the issue regarding reasonable reunification services on this appeal.

## II. Father's Ineffective Assistance of Counsel Argument Is Without Merit

Father contends that he “was denied his right to effective assistance of counsel where counsel was relieved with no notice to [father] on the eve of the [section] 366.26 selection and implementation hearing.”

To show IAC in a dependency proceeding, father must meet the standards set forth in *People v. Pope*<sup>4</sup> and *Strickland v. Washington*.<sup>5 6</sup> To rise to the level of reversible error, asserted ineffective assistance must meet a two-prong test. “First, there must be a showing that ‘counsel’s representation fell below an objective standard of reasonableness . . . . [¶] . . . under prevailing professional norms.’ [Citations.] Second, there must be a showing of prejudice, that is, ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’”<sup>7</sup> “The burden is on the [father] to demonstrate conduct falling below the standard of care of the legal practitioner. .

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<sup>3</sup> *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811; Section 366.26, subdivision (l)(1); California Rules of Court, rule 39.1B (d).

<sup>4</sup> *People v. Pope* (1979) 23 Cal.3d 412.

<sup>5</sup> *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674].

<sup>6</sup> *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711.

<sup>7</sup> *In re Emilye A.*, *supra*, 9 Cal.App.4th 1695, 1711.



. . We cannot assume that the decision was the result of negligence, when it could well have been based upon some practical or tactical decision governed by client guidance.”<sup>8</sup>

The proper method to raise an IAC claim is by writ of habeas corpus, not appeal.<sup>9</sup> The court in *Arturo A.* noted that, “The establishment of ineffective assistance of counsel most commonly requires a presentation which goes beyond the record of the trial. . . . Action taken or not taken by counsel at a trial is typically motivated by considerations not reflected in the record. . . . Evidence of the reasons for counsel’s tactics, and evidence of the standard of legal practice in the community as to a specific tactic, can be presented by declarations or other evidence filed with the writ petition.”<sup>10</sup> It is for this reason that writ review of claims of ineffective assistance of counsel is the preferred review procedure. The only exception to the rule requiring a writ for raising an ineffective assistance claim is where “‘there simply could be no satisfactory explanation’ for trial counsel’s action or inaction.”<sup>11</sup>

We conclude that father has improperly raised his IAC claim on appeal because the proper vehicle for raising such a claim is by a writ of habeas corpus. Nonetheless, father’s claim is without merit.

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<sup>8</sup> *In re Arturo A.* (1992) 8 Cal.App.4th 229, 243 (*Arturo A.*).

<sup>9</sup> *In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1253 (*Eileen A.*).

<sup>10</sup> *Arturo A.*, *supra*, 8 Cal.App.4th 229, 243.

<sup>11</sup> *Eileen A.*, *supra*, 84 Cal.App.4th 1248, 1254.

A. Failure of Father's Counsel to Attend the Section 366.26 Hearing

As stated above, father's counsel failed to appear at the initial section 366.26, and the child's counsel appeared specially on behalf of father at this hearing. Father claims that his counsel and child's counsel, who specially appeared for father's counsel, rendered ineffective assistance. We disagree.

Father claims that the child's attorney had a direct conflict with father's position; the child's counsel advocated the termination of father's parental rights, while father opposed such termination. Even if we were to assume that both attorneys' representation fell below an objective standard of reasonableness, we cannot discern any prejudice. Nothing occurred at the hearing. The court simply reaffirmed the previous visitation orders and continued the section 366.26 hearing. The juvenile court told father that he would have ample opportunity to present his issues to the court at the contested section 366.26 hearing. Father's IAC claim on this issue borders on the frivolous.

B. Appointment of New Counsel and New Counsel's Representation of Father

Father claims that he received ineffective assistance of counsel when, without prior notice, his counsel was relieved and a "new counsel substituted who was unable to address the issues." Again, father's argument is without merit.

Father's basis for his IAC claim seems to be the fact that his new counsel, at the contested section 366.26 hearing, stated as follows: "[Father] has a lot of concerns that are not relevant to this hearing as to how matters have proceeded over the entire course of this case. . . .

".....

“We are at a .26 hearing, and father indicates that there are reports that he never received. And since I was not the attorney appointed -- attorney until at least February the 20th of this year, I have no way of knowing for certain how various matters were handled.”

From the record before us, we can discern that, in general, father had concerns over misinformation, the social worker’s lack of straight-forwardness to father, and the sexual orientation of the child’s prospective adoptive parents. Moreover, father believed that he did not receive certain reports during the dependency proceedings. These are not issues to consider at a section 366.26 hearing. The only issues are whether the child was adoptable and whether an exception to the adoption applies.<sup>12</sup> Therefore, father’s counsel had no reason to raise father’s “concerns” before the court.

The burden is on father to demonstrate conduct falling below the standard of care of a legal practitioner and prejudice. Father fails to meet this burden. Therefore, we cannot conclude that father’s counsel was ineffective.

#### DISPOSITION

The judgment is affirmed.

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Ward, J.

We concur: McKinster, Acting P.J.  
Richli, J.

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<sup>12</sup> Adequacy of services or the return of the child are not at issue at a section 366.26 hearing. The purpose of the hearing is to select a permanent plan for the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295.) Moreover, the suitability of a potential adoptive family is not relevant to the required findings under section 366.26. (*In re David H.* (1995) 33 Cal.App.4th 368.)